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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,

Petitioner,

against

TELECHRON, INC., and GENERAL ELECTRIC COMPANY,

Respondents.

BRIEF FOR THE PETITIONER

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In the

Supreme Court of the United States

October Term, 1954

No. 302

Anthony J. Parissi,

Petitioner,

against

Telechron, Inc., and General Electric Company,

Respondents.

BRIEF FOR THE PETITIONER

No Opinion Below

The decision of the Court of Appeals was entered without opinion (R. 10).

Jurisdiction

The decision of the Court of Appeals was entered on June 10, 1954. The petition was filed August 24, 1954, and was granted October 25, 1954. The jurisdiction of this Court rests on 28 U. S. C. sec. 1254 (1).

Question Presented

Is it proper to dismiss an appeal where a Notice of Appeal, and $250.00 Appeal Bond, were timely mailed and timely received by the District Court Clerk into his custody

in the Clerk's Office, but the $5.00 Clerk's fee was untimely received?

(a) Where such Notice and Bond are so received, is this not a timely filing?

(b) Where the Clerk has a choice either to withhold or to note the date of the receipt of such Notice and Bond on such papers, or in his docket, can the question of late payment of such $5.00 fee defeat jurisdiction?

(c) Where the Clerk exercises his choice and does not note on such papers, or in his docket, the actual date that he timely received the same, but the date he received the late $5.00 fee, is not a nunc pro tunc order proper to cause the Clerk to accord applicant a filing date as of the time the necessary papers were actually received?

Statute Involved

United States Code, Title 28:

> "§ 1917. *District courts; fee on filing notice of or petition for appeal*: Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5.00 shall be paid to the clerk of the district court, by the appellant or petitioner."

Statement

On April 22, 1954, a judgment (R. 3) was entered in the District Court for the Northern District of New York, in Albany, N. Y., dismissing Parissi's claim for unjust enrichment based on breach of confidence by Respondents,

and holding his patents invalid as the result of an action for declaratory judgment filed by Telechron, Inc., and General Electric Company.

On May 20, 1954, the necessary notice of appeal and appeal bond (R. 6) were sent, registered mail, to the Clerk of the District Court in Utica, N. Y., for filing, but the $5.00 Clerk's fee was inadvertently omitted. The next day the Clerk wrote Petitioner's counsel an over-the-week-end letter (R. 9) (without other notice, oral or otherwise) stating he would withhold filing until he obtained the $5.00 fee. Such fee was immediately sent by return mail (R. 9).

Fearing that the Clerk, for some reason or other, might not choose to accord the notice of appeal a filing date as of the day he received it, an order nunc pro tunc (R. 7) was obtained on affidavit, signed by the District Judge having jurisdiction of the case—not for any enlargement of time beyond the 30-day appeal period for Petitioner to take action to prepare and submit his notice of appeal and bond—but to have the Clerk act to accord the notice of appeal a filing date as of the time it was actually received into his custody; and the Clerk did so (R. 1). There was no necessity or question of extending the time. All the proceedings were had.

On June 3, 1954, Respondents moved to dismiss the appeal (R. 10).

The Court of Appeals, after hearing arguments on the motion, suggested that Petitioner's counsel should have several days' time to present a memorandum, and further suggested that, among other arguments, Petitioner should move, for example, under Rule 60(b). The memorandum was so presented, but the Court dismissed the appeal forthwith—without any opinion (R. 10).

Summary of Argument

A notice of appeal is just as truly "filed" as much as it ever will be when it is timely placed in the custody of the Clerk in the District Court, regardless of whether he untimely dockets it. A nunc pro tunc order under such circumstances of untimely docketing is proper to cure the clerk's act of omission properly to perform his official duty to make him accord such papers a filing date as of the day he received them. Late payment of a $5.00 Clerk's fee, where everything else necessary to take an appeal has timely been done regarding appeal papers, cannot go to the jurisdiction where the clerk has a choice to record the filing of such papers or not, when he pleases, since this might arbitrarily defeat appellate jurisdiction. There is no distinction in this respect, that is, late payment of a $5.00 fee, between criminal and civil cases where the appellants must proceed under the same statute, namely, U. S. Code, Title 28, sec. 1917. A gross injustice would result if such a slight technical error, or mere procedural irregularity, as a late payment of a $5.00 fee, were to deprive Petitioner of appellate review of the merits of his case.

ARGUMENT

I

"Filing" means timely placing of papers into the custody of the Clerk or other official of the Court.

It goes without saying, that when an appellant does nothing at all toward perfecting an appeal "on time", or files his papers "out of time", the "bars are down" and the appellate court is deprived of jurisdiction. There are many cases that make this only too clear. But this case,

and those cited in support of it, do not fall in this category. Parissi timely filed all his appeal papers.

Bouvier's Law Dictionary states:

> "Filling a paper * * * consists in placing it in the custody of the proper official * * *. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file."

4 Federal Rules Service, p. 818:

> "'Filing' of notice of appeal means delivery into the actual custody of the clerk or judge within the time prescribed by statute."

Casalduc v. Diaz, 117 F. 2nd 915 (1 Cir. 1941):

> "'Filing' means delivery of the paper into the actual custody of the proper officer. The Washington, 2 Cir., 16 F. 2nd 206, 208."

United Drug Co. v. *Helvering*, 108 F. 2nd 637 (2 Cir. 1940), p. 638:

> "* * * something must be done in the proper Court to indicate an intent to review" Rule 73(a). [See also *Jarowski* v. *Hamburg*, 186 F. 332 (2 Cir.) cited herein.]

Federal Deposit Ins. v. *Congregation*, 159 F. 2nd 166 (2 Cir.):

> "The situation is one which demands some ready means of ascertaining the moment when occurs this 'crux of taking an appeal'. The least requirement, which will be tolerable, is that some paper shall be accessible in the records of a court upon which both judges and parties can rely."

In *Crump* v. *Hill,* 104 F. 2nd 36 (5 Cir.), it even was held that the filing of a Notice of Appeal after the required time could not divest the Circuit Court of Appeals of jurisdiction established by proceeding within the time, equivalent to filing and a substantial compliance with the rule which conferred jurisdiction; and on page 38 the Court says:

> "It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a traversy upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

Mutual Life Ins. Co. v. *Phinney,* 178 U. S. 327, 336, 337: Where the Clerk timely received but omitted to record the filing, this court held:

> "In this case there is no question of time. All the proceedings, with a view of taking the case to the appellate Court, were had within less than three months from the date of judgment. * * *"

> "* * * that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made, the Court of Appeals had jurisdiction and should have proceeded to dispose of the case upon its merits."

Reynolds v. *Imlay*, 118 F. 2nd 53 (Ct. App. D. C.):

> "If the Court finds the notice was duly and timely offered for filing, it may exercise its power to make the record conform to the truth (Rule 75th)."

It seems almost impossible that a situation such as the present one could occur in large cities, or where the Clerk's office is in the same city where attorneys are practicing. Papers are offered and the fee immediately demanded and paid. There is not much chance for inadvertence, mistake or neglect to pay it; but those chances, when the Clerk's office, as here, is in a distant city, as Utica is distant from Albany, are considerably increased when mailing such papers must be relied upon. In outlying districts such as ours, attorneys conventionally consult and rely on the local rules regarding filing of papers. There was nothing in the local rules which mentioned a $5.00 Clerk's fee for appeals in civil cases. However, since the happenings of the instant case, new rules now have been printed for the Northern District of New York, effective September 1, 1954, and Rule 5 now calls for payment of all fees in advance.

Under *Rule 5(c)* of the *Fed. Rules of Civil Procedure*:

> "• • • The Judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the Clerk."

This shows that filing is not a mere question of a docket entry or a notation on the papers that the same have been filed, but one of getting the papers into the custody of the Court through the Clerk or Judge. Docketing or noting the filing date on papers is merely evidence that they have been filed.

Petitioner was not inclined to bother or seek out the District Judge in Albany with filing his Notice of Appeal.

But if he had, and had failed to pay the Judge a $5.00 fee, it would seem, nevertheless, that under the above Rule, the Notice of Appeal would have been considered properly filed.

II

A nunc pro tunc order is proper to correct the Clerk's record to make it conform to the facts.

The Clerk's failure to evidence the filing date on the timely received notice of appeal and bond, or to docket the same, as of the day he received it was an act of omission of his official duty. Obviously, if the docket entry showed a receipt of the appeal papers "out of time", when in fact they were received "in time", it would be misleading and cause any appellate Court, of its own motion, to refuse to take jurisdiction. Parissi's nunc pro tunc order (R. 7) sought merely to correct the record, or the Clerk's "omission."

The order nunc pro tunc in the instant case was perfectly proper. No attempt was thereby made to permit Petitioner to take any action by way of preparing and submitting appeal papers after the lapse of the 30-day appeal period; or to anticipate the actual time of presenting the appeal. Such action had already been taken. The intent to appeal was clear. Respondents' rights had not been prejudiced. They had been given prior notice of Parissi's appeal (R. 8.)

Under Rule 6(b), F. R. Civil P. states:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable

> neglect; but it may not extend the time for taking any action under Rules * * * 73 (a) * * *, except to the extent and under the conditions stated in them."

Of course, this comes under "Enlargement" and excludes that portion of Rule 73(a). But Petitioner was not acting under this latter Rule to seek "Enlargement" by his nunc pro tunc order as heretofore explained. On the contrary, Petitioner sought to insure the validity of the appeal already taken by timely delivery of his appeal papers into the actual custody of the Clerk and make him accord his papers a proper rather than an improper date —to keep the record straight. Rule 73(a) also states:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal. * * *"

It was suggested by the Court below at the hearing that Rule 60 might be invoked. Certainly, the procedure by nunc pro tunc order comes within this Rule. Section (a) of the Rule states that:

> "Clerical mistakes * * * arising from oversight or *omission* may be corrected by the court at any time of its own initiative or on the motion of any party * * *. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." (Italics ours.)

And Section (b) of the Rule states that:

> "* * * the court may relieve a party or legal representative from final judgment, order or proceeding for the following reason: (1) mistake, inadvert-

> ance, * * *, or excusable neglect; * * * or (6) any other reason justifying relief from the operating of the judgment."

In *Hill* v. *Hawes*, 320 U. S. 520, 524, the discretion of the trial judge was upheld in vacating the former judgment and entering a new judgment merely to extend the time of appeal. This Court said:

> "The term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the cause."

U. S. v. *Todar*, 41 F. 2d 146, 147 (7 C. C. A.) regarding a nunc pro tunc order, states:

> "Respecting the first contention, it seems clear that to confer jurisdiction of an appeal it must have been applied for in the court which gave the judgment, within three months of its rendition. Title 28 sec. 230, U. S. Code (28 U. S. C. A. sec. 230) citing many other Federal decisions. * * * After the entry of these judgments on August 22, 1928, the record discloses no further action respecting the appeal until the order of the District Court of March 30, 1929, allowing appellant an appeal in each case nunc pro tunc as of November 19, 1928, which last date is within 3 months after the entry of the judgments."

III

Where the Clerk has a choice to act or not to act under a statute it cannot be jurisdictional.

It is stated, in part, in the statute, 28 U. S. C. Sec. 1917, that—

> "Upon the filing of * * * an appeal * * * $5.00 shall be paid to the Clerk of the District Court, by the Appellant * * *."

This section does not state or even imply that the fee *must* be prepaid, or paid in advance, or that payment of the fee is a condition precedent that will defeat jurisdiction. It is more logical and reasonable, under such extenuating circumstances as those here involved, that the payment of the fee, if anything, is a condition subsequent, without jurisdictional effect on the original filing. "Upon the filing", or when the Clerk files, he is entitled to his fee.

It is clear that the Clerk has a choice—to formally file, or record the filing, of an appeal, with or without the $5.00 fee, or to withhold formal filing, i. e., endorsing the filing date on the papers or in the docket.

53 Corpus Juris 618, makes this quite clear:

> "However, there is authority that he (clerk) may record the instrument on his own responsibility; and, if he does admit the instrument to record without payment of the fee, the record is not thereby invalidated. * * * and when the clerk receives and retains the instrument in his official custody, the recording is not invalidated because the fees were not prepaid."

See also *36 C. J. S. 752-7* (Filed and Filing).

Where the clerk has a choice or discretion to formally file or not, as he sees fit, without the fee, or with a late fee, where the papers were timely received by him into his custody—the question of the fee cannot affect the jurisdiction. Otherwise, the Clerk would have arbitrary power, even to the extent of defeating appellate jurisdiction.

American Exch. Nat. Bank of Dallas, et al. v. *Colonial Trust Co.*, 186 S. W. 361, 363.

> "But when the clerk receives and retains the instrument in his official custody it is filed within the

> meaning of the law. It is not intended by the article (statute) to clothe the clerk with the power of making or defeating rights. • • •"

The *American Exchange* case is cited and distinguished in *Oil Well Supply Co.* v. *Wickwire*, 52 F. Supp. 921, as is also the case of *Hamilton* v. *People*, 61 Ill. App. 91. "It was not the intent of the legislature to require county officials to demand fees in advance and be liable for all fees earned whether collected or not." Nor that such official "should refuse to perform an official duty except upon payment of the fee therefor."

Such cases as *Oil Well Supply Co.* have to do with statutes which call for "advance payment of fees" as a prerequisite to filing. That is not the situation with the statute here involved. Nor does 28 U. S. Sec. 1917 contain or imply any such language as "advance payment of fees" or its equivalent. But see Sec. 1914(c) of 28 U. S. C. (having to do with original process filing fees of $15.00, and habeas corpus filing fees of $5.00) which in this connection states: "Each district court by rule or standing order may require advance payment of fees." Sec. 1917 does not even contain the equivalent of this language. Yet, after Parissi's sad experience, new rules of the U. S. District Court for the Northern District of New York were published, effective September 1, 1954, and Rule 5 now requires for the first time that *all* fees be "paid in advance."

Such cases as *Mondakota Gas Co.* v. *Montan Dakota Utilities Co.*, 194 F. 2nd 705 (9 Cir. 1952) and *Turkett* v. *United States*, 76 F. Supp. 769 (N D. N. Y. 1948), where failure to pay the $5.00 fee was held to be fatal, also clearly imply that the Clerk has a choice. These two cases otherwise differ from the instant case in that no successful attempt was made to cure the clerk's omission as by an order nunc pro tunc while the Court still had jurisdiction and the term had not expired.

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327, 336 (*supra*) states:

> "Is it within the power of a clerk to overrule the action of the judge, and prevent an appeal or writ of error which he has allowed?" * * * Can it be that the omission of a clerk can prevent the jurisdiction from attaching to the appellate court? Obviously not."

IV

Parissi at least should have been accorded impartial treatment under the law since there is no distinction between civil and criminal cases where both appellants must proceed under the same statute, namely, U. S. Code, Title 28, Sec. 1917.

Parissi's case is of a civil nature. It has to do with a claim of unjust enrichment for breach of confidence against respondents for misappropriation of his inventions; as well as a claim against respondents infringement of his patents. The four cases immediately following are criminal cases.

In *Oddo* v. *United States*, 171 F. 2nd 854 (2 Cir. 1949), cert. den. 337 U. S. 943, appellant's notice of appeal was timely received by the Clerk on March 29, 1948, who did not record it until April 7, 1948 (after the appeal period had expired) because the $5.00 filing fee did not arrive until that date. Because this was a substantial compliance the Court assumed jurisdiction and held (p. 855):

> "The fact that the notice of appeal was unaccompanied by the filing fee does not in our opinion impair its validity. It is true that we do not find in the Criminal rules the equivalent of Civil Rule 73(a) which provides that the failure of appellants to take further steps after filing notice of appeal does not affect the validity of the appeal."

In *Wallace* v. *United States*, 174 F. 2nd 112, 114 (8 Cir. 1949), the Clerk timely received the notice of appeal, but not the filing fee, yet the court assumed jurisdiction.

Boykin v. *Huff*, 121 F. 2nd 865, 873 (Ct. App. D. C. 1941), where the notice of appeal was timely submitted to the Judge but no fee at all was paid—the Court held:

> "nor was the filing ineffective, in these circumstances, because appellant did not tender the five-dollar filing fee as required by the statute and rules."

Williams v. *United States*, 188 F. 2nd 41, 42 (Ct. App. D. C. 1951), the notice of appeal was prepared and submitted in time to a United States marshal but was not received by the Clerk in time, because not delivered promptly and the court held:

> "In such a situation, therefore, the filing was not ineffective because appellant did not tender the filing fee."

It is quite obvious that the failure timely to pay the $5.00 fee, or to pay it at all, was not regarded by the Court in each of the above cases as affecting their jurisdiction. They were satisfied that an appeal had been "taken" since the notice to the Clerk was timely. Whether or not the criminal appellants were incarcerated, or represented by counsel, is as much beside the point as the failure timely to pay a $5.00 fee. Such incidents, or the lack of them, did not confer jurisdiction on the appellate court in each case. It was the timely receipt of the notice of appeal or action on the part of the appellants that gave the jurisdiction. If there had otherwise been no jurisdiction, each appellate court would, of its own motion, have refused to take jurisdiction—and that would be the end of it.

Parissi, as a civil appellant in the court below, was entitled to impartial treatment since there is "equal justice

under law". Parissi's position is even stronger in a civil case. F. R. Civil P. 73(a) states:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, * * *."

F. R. Criminal P. 37 contains nothing equivalent to the quoted language above.

It would hardly seem equitable and just, after several years of litigation, involving two intermediate appeals, a trial lasting about 20 days and covering 2500 or more pages of a transcript of record, comprising issues of unjust enrichment for breach of confidence for misappropriation of his inventions, intermingled with issues of patent validity and infringement of his patents,* if Parissi were now to be denied a hearing by an appellate court on the merits of his case. Parissi should not be deprived of justice because of a late $5.00 clerk's fee, at most a mere procedural

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* Parissi's path has, from the outset, been strewn and beset with technicalities not of his own making. He commenced his action, lacking diversity of citizenship, in the New York Supreme Court against General Electric Company for unjust enrichment, for misappropriation of his inventions, based on breach of confidence. General Electric Company and Telechron, Inc., by a concerted maneuver, sued Parissi in the Federal Court for a Declaratory Judgment to invalidate his patents and, on petition, removed his unjust enrichment action to the Federal Court. On Parissi's motion, his case was remanded to the State Court. See *Parissi* v. *G. E.*, and, *Telechron and G. E.* v. *Parissi*, 89 U.S.P.Q. 134 and 136, respectively. See also 28 U. S. C. Sec. 1447(d) "An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise". Despite this, and over Parissi's objections, the State Court issues were tried in the Federal Court, the remand in effect reviewed, but the statute (above) ignored. See *Telechron, Inc. and G. E.* v. *Parissi*, 197 F. 2nd 757 (C. A. 2). Following this, Parissi was denied a jury trial on the unjust enrichment issues removed from the State Court. *Parissi* v. *Foley*, 203 F. 2nd 454 (C. A. 2).

irregularity or slight technical error, especially when his notice of appeal and $250.00 cost bond (which of itself adequately covers such fee) were timely filed with the clerk. Parissi should be heard on appeal on the merits of his case.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the lower Court be vacated, and the appeal heard on the merits.

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